In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 214

WESTERN LAUNDRY AND LINEN RENTAL CO. AND MORRIS A. HAZAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–9) is not yet reported. The orders of the district court entered on January 27, 1969 (R. 220), and September 26, 1968 (R. 84), are unreported.

JURISDICTION

The opinion of the court of appeals was entered March 30, 1970. On April 30, 1970, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including May 29, 1970. The petition was filed on June 2, 1970, and is thus untimely under Rule 22(a) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

389-635—70

QUESTIONS PRESENTED

1. Whether a partnership may be indicted and prosecuted in its own name and as a separate entity for violation of the Sherman Act.

2. Whether the imposition of a fine on both a partnership and an individual partner for violation of the Sherman Act constitutes double punishment of the individual partner.

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. 1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any [such] contract or engage in any [such] combination or conspiracy * * * shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.

Section 8 of the Sherman Act (15 U.S.C. 7) provides:

> That the word "person", or "persons", wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

1 U.S.C. 1 provides, in pertinent part:[1]

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> * * * the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals; * * *.

STATEMENT

Petitioners—Western Laundry & Linen Rental Co. (Western), a partnership, and Morris A. Hazan, a partner in Western[2]—were indicted together with five corporations and four other individuals for conspiring to raise, stabilize and maintain prices of linen supplies in the Las Vegas, Nevada, area, to refrain from soliciting one another's customers, and to allocate business, in violation of Section 1 of the Sherman Act (15 U.S.C. 1). On July 24, 1968, all of the defendants, including petitioners, were convicted upon pleas of *nolo contendere* and were sentenced to pay fines of varying amounts.[3]

On September 25, 1968, Western and Hazan filed a "Motion to Eliminate and to Reduce Sentences." The motion was based primarily on the argument that the indictment of both Hazan and his partnership constituted double jeopardy and the imposition of

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[1] The text of this section as set forth in the petition (Pet. 4) is, with one error, the version which existed at the time of the adoption of the Sherman Act. See Revised Statutes § 1. However, the section was amended in 1948.

[2] Hazan holds a 19-percent interest in Western; the other 81 percent is owned by a corporation, Delmar (R. 97–98).

[3] Western received a $25,000 fine and Hazan a $1,000 fine.

sentences against both constituted double punishment of Hazan. On September 26, 1968, the district court entered an order denying the motion.

A motion for reconsideration was filed on September 30, 1968, and a hearing was held on November 15. In addition to arguing that the prosecution of both Hazan and Western constituted double jeopardy, the defendants also raised, for the first time, the argument that a partnership is not subject to prosecution under the Sherman Act. On January 28, 1969, the district court entered an order denying the motion for reconsideration.

The court of appeals affirmed, first holding unanimously that a partnership may be prosecuted for violation of the Sherman Act. A majority of the court (Judges Madden and Ely) also held that the indictment of both the partnership and the individual partner neither constituted double jeopardy nor resulted in double punishment as to Hazan. Since the liability of the partnership and the partner are separate and distinct, and the fine imposed upon the partnership can be collected only from its assets, the court concluded that "we cannot say that Hazan has been put in double jeopardy" (Pet. App. 7). Judge Hufstedler concurred specially on the ground that "Hazan's *nolo* plea waive[d] his claim that he was indicted and punished in two capacities for the same offense" (Pet. App. 8). Judge Ely also agreed that Hazan had waived any double jeopardy defense he might have had by pleading *nolo contendere* (Pet. App. 9).

ARGUMENT

As noted earlier, the instant petition was filed out of time. In any event, the decision of the court of appeals correctly interprets the Sherman Act, applies settled principles for the treatment of partnerships under federal criminal law, and does not conflict with the decisions of any other court. Further review is thus not warranted.

1. The court below properly concluded that the prohibitions of the Sherman Act apply equally to partnerships as well as to other forms of business entities such as corporations (Pet. App. 2–4). The Sherman Act is directed against business conduct, such as price-fixing, allocation of territories and boycotts, where such action restrains trade and commerce. It makes no difference in terms of the economic harm against which the Act is directed whether a business firm is organized legally as a corporation, a partnership or an individual proprietorship. Cf. *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344, 392.

In *United States* v. *A & P Trucking Co.*, 358 U.S. 121, this Court articulated the reasons why the legal form of a business enterprise was not controlling in the enforcement of federal statutes designed to regulate conduct (358 U.S. at 124):

> * * * In the effectuation of this policy [enforcement of motor carrier safety requirements] it certainly makes no difference whether the carrier which commits the infraction is organized as a corporation, a joint stock company, a partnership,

or an individual proprietorship. The mischief is the same, and we think that Congress intended to make the consequences of infraction the same.

In *A & P Trucking* the Court held that a partnership could be indicted for violations of two statutes regulating safety and certification requirements for motor carriers. Although one of the statutes, Section 222(a) of the Motor Carrier Act (49 U.S.C. 322(a)), was part of an Act which defined "person" to include partnerships, the other statute, 18 U.S.C. 835, contained no such definition. The Court's conclusion that a partnership could be prosecuted for both offenses in its own name, with its liability distinct and separate from that of the partners, is in accord with the general rules of construction stated in 1 U.S.C. 1, in light of which all federal statutes are to be construed. See also *United States* v. *Adams Express Co.*, 229 U.S. 381.

Moreover, while the legislative history is not substantial, it is fair to conclude that Congress intended that the Sherman Act's coverage be as broad and unqualified as possible. The definition in Section 8 was intended to make certain that corporations and associations were included; it was not intended to limit the coverage of the Act to the forms of business activity specifically named. See *United States* v. *Brookman Co.*, 229 F. Supp. 862 (N.D. Calif.); Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. Chi. L. Rev. 221, 257–258 (1956).

2. The court below also correctly concluded that the imposition of a fine on both an individual partner and the partnership did not constitute double jeopardy or

double punishment of the partner (Pet. App. 4–7).[4] As noted previously (*supra*, p. 3), petitioners were indicted together with five corporations and four other individuals for a conspiracy to fix prices and allocate business. The indictment and punishment of these petitioners in their separate capacities, as the court below held, no more violates the double jeopardy provision than did the indictment of the corporate defendants and their respective officers.[5]

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[4] Judge Hufstedler's concurring opinion below suggested that "Hazan's *nolo* plea waives his claim that he was indicted and punished in two capacities for the same offense" (Pet. App. 8). The government does not seek to rely on the fact that petitioners pleaded *nolo contendere*. A serious question is presented, however, by their failure to raise this claim until three months after plea and almost two months after conviction. If the "Motion to Eliminate and Reduce Sentences" is treated as a motion to arrest judgment under Rule 34, F. R. Crim. P., as petitioners themselves appear to treat it (Pet. 17–18), it was plainly out of time. In this connection, petitioners' reliance on *Lott* v. *United States*, 367 U.S. 421, is misplaced. The Court's holding there, that such a motion need not be made until after entry of judgment on a *nolo* plea, was specifically overturned by the 1966 amendment of Rule 34, which now requires such a motion to be made within seven days of the plea.

If, on the other hand, petitioners' motion is viewed as one to correct illegal sentences under Rule 35, F. R. Crim. P., there would appear to be no timeliness problem. Such a motion may be made at any time and is appealable where, as here, it is alleged that multiple sentences were imposed for a single offense. *Heflin* v. *United States*, 358 U.S. 415; cf. *Hill* v. *United States*, 368 U.S. 424, 430.

[5] Western Laundry & Linen Rental Company was described in the indictment as "a partnership existing under the laws of the State of Nevada" (R. 3). On October 11, 1968, the defendants filed an affidavit of one Harold Easton, an attorney, stat-

The crucial factor in the liability of any individual for violation of the Sherman Act is that "he knowingly participates in effecting the illegal contract, combination, or conspiracy * * *." *United States* v. *Wise*, 370 U.S. 405, 416. Since the liability of an individual for violation of the Sherman Act is dependent upon his knowing participation in an unlawful conspiracy, an individual partner cannot be held responsible for the partnership's conduct simply because he is a partner. Likewise, because of the distinct capacity of the partnership and the partners, when a partnership is indicted and convicted as an entity the government can look only to the partnership assets in collecting any fine imposed. This Court so stated in *United States* v. *A & P Trucking Co.*, *supra* (358 U.S. at 427):

> The corollary is, of course, that the conviction of a partnership cannot be used to punish the individual partners, who might be completely free of personal guilt. As in the case of corporations, the conviction of the entity can lead only to a fine levied on the firm's assets.

In these circumstances, where the liability of the partner is dependent on his actual participation in the conspiracy and the partnership is treated as a separate and distinct business entity comparable to a corpora-

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ing that Western was a joint venture between Delmar Corporation and defendant Hazan (R. 96). Western has, however, treated the issue as one concerning the liability of a partnership. In any event, as the court below held, all forms of business associations are subject to prosecution under the Sherman Act and the result with respect to the double jeopardy and double punishment issue is the same whether Western is characterized as a joint venture or a partnership.

tion, the indictment and conviction of both the partnership and the partner does not subject the individual to double jeopardy or double punishment.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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